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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CITY OF YONKERS and
YONKERS COMMUNITY DEVELOPMENT AGENCY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a City may be held liable for school desegregation, when, as a matter of state law, control of schools is vested solely in the hands of an independent school board, and the only bases for finding the City liable for school segregation are the City's independent liability for discriminatory site selection in public housing and the mayor's exercise of his discretionary authority to appoint members to the school board.

2. Whether a City, which has been held liable for segregated conditions in its public schools and which has spent substantially more on a magnet-school remedy than it would have spent on a bussing remedy, bears the burden of demonstrating that each additional school-related expenditure requested by the plaintiffs or the school board is unreasonable or unnecessary.

3. Whether the City's responsiveness to community opposition to certain sites for public housing is sufficient to hold the City liable for intentional discrimination, if the community opposition is based, in some "significant" respect, on racial animus.

LIST OF PARTIES

In addition to the parties listed in the caption, the parties to the proceeding in the court below included the Yonkers Branch—National Association for the Advancement of Colored People as Plaintiff-Intervenors and the Yonkers Board of Education.

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v.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The City of Yonkers and the Yonkers Community Development Agency hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is not yet reported. The opinion of the district court regarding liability (App. 125) is reported at 624 F. Supp. 1276 (S.D.N.Y. 1985). The district court's May 13, 1986 Order for the Desegregation of the Yonkers Public Schools (App. 683) is reported at 635 F. Supp. 1538 (S.D.N.Y. 1986). Further orders of the district court modifying and supplementing the School Desegregation Order (App. 755) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1987. On March 16, 1988, Justice Marshall extended the time for filing this petition to and including April 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution (U.S. Const., amend. XIV) provides in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. This action was instituted by the United States against the petitioners, the City of Yonkers, New York, which is the fourth largest city in the State, and the Yonkers Community Development Agency (collectively the "City") and against the Yonkers Board of Education ("School Board" or "Board"). The suit was filed in the United States District Court for the Southern District of New York on December 1, 1980. The complaint, which alleged violations of the Fourteenth Amendment to the United States Constitution, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, sought an injunction requiring the Board to implement a system-wide plan to desegregate the public schools and requiring the City to adopt a housing plan locating public and subsidized housing on sites throughout the City of Yonkers.

On November 20, 1985, the district court issued a liability opinion (App. 125), finding that the City had violated the Equal Protection Clause and the Fair Housing Act in its selection of sites for public and subsidized

housing and that the City thereby had violated the Equal Protection Clause by its role in perpetuating and exacerbating racial segregation in the Yonkers public schools. The district court further found that the Board had violated Title IV of the Civil Rights Act and the Equal Protection Clause by maintaining and operating a segregated school district. Following its finding of liability, the court issued a series of remedial orders. See App. 683. On December 28, 1987, the court of appeals unanimously affirmed the judgment of the district court "in all respects." App. 122.

2. On the issue of housing, the City's liability arises from the district court's finding that the City selected sites for low-income housing in areas that had a higher concentration of minority residents, particularly in the Southwest section of the City. With respect to the City's "intent" in selecting sites for public housing, the court found that "whenever a site was proposed for a predominantly white area, strong community opposition emerged." App. 24. "Though this opposition was not 'based *wholly* upon race,' race was 'a significant factor' " in community opposition. *Id.* (emphasis in original). Thus, largely based on the finding that City officials, particularly members of the City Council, were responsive to community opposition, the district court concluded that such "significant" racial motivation could be attributed to the City. Accordingly, the district court concluded that the City was liable for intentional discrimination in its selection of sites for the placement of low-income housing.

With respect to the school issues, the district court found that the Yonkers Board of Education "is an independent municipal corporation subject to the control of the New York State Board of Regents and the Commissioner of Education." App. 333-34 (citing N.Y. Const., Art. V, § 4; N.Y. Educ. Law §§ 305, 2551 (McKinney 1970)). The Board is empowered by state law to exercise exclusive responsibility and control over the

educational affairs of the Yonkers City School District ("YCSD"). App. 334. "Among the Board's powers is the authority to hire the Superintendent of Schools," whose duties include the "development and implementation of policies affecting school construction and closings, the setting and changing of attendance zone lines, grade structure, personnel policies, and other educational matters." *Id.*

The City's "specific legal powers relating to the operation of the Yonkers public schools" include the City Council's power to "appropriate an annual budget for the school district." App. 334. The Board prepares and submits its own operating budget requests and the City Council, after examination and hearings, "appropriates a specific dollar amount," which the Board and the Superintendent are then free to spend "for any educational purpose." App. 583. The City has no control over line item requests and no control over how the Board spends its general appropriation.[1]

In addition to budgetary authority, the City, through the Mayor, possesses authority to appoint the nine members of the Board for five-year, staggered-terms of office. App. 334. Once appointed, members of the Board are independent of the City and are not subject to removal or control by the City Council or the Mayor. Moreover, the court found that "[t]he Mayor has generally maintained little personal contact with his appointees subsequent to their appointment to the Board." App. 589.[2]

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[1] Funds of capital expenditures and funds obtained through "special estimate" procedures receive additional scrutiny by the City. App. 583. The district court found that the capital expenditure and special estimate procedures gave the City budgetary influence and indirect control over school funding procedures, but the court found that there was no evidence that the City intentionally used its indirect influence over these budgetary procedures to perpetuate racial segregation in the Yonkers public schools. *Id.*

[2] The court noted an "absence of evidence" that the Mayor or other City officials "attempt[ed] to dominate or control Board members subsequent to their appointments . . . ." App. 668.

In addressing the School Board's liability for unlawful school segregation in Yonkers, the district court found that the Yonkers public schools were racially segregated (App. 338-45) and that the conduct of the Board contributed to creating and maintaining the racially segregated conditions that affected the school system as a whole. App. at 345-576, 632-55. Thus, the court concluded that the "Board is liable for the racial segregation of Yonkers public schools." App. at 655.

The district court went on to examine the question of "the imposition of municipal liability [for school segregation] and the fashioning of 'school-specific' relief" against the City, as well as the Board. App. 661. First, the court held that the "City's housing practices provide a strong basis for holding the City legally responsible for the racial segregation of the Yonkers public schools." App. 666. According to the district court, segregated public housing patterns, for which the City had been held liable, "had clearly segregative consequences not only for residential conditions in the city; in light of the school district's historic neighborhood school policy, the perpetuation and exacerbation of racial imbalance [in the schools] was a natural, probable and actually forseen consequence" of the City's site selection for public housing. App. 665.

Second, the district court found that "mayoral appointment of Board members" was "relevant evidence of overall municipal intent to maintain the racial segregation of Yonkers public schools." App. 667. The court found that the mayoral pattern of Board appointments—the failure to appoint Board members "known for their commitment to school desegregation" and the appointment of individuals who opposed bussing to achieve integration—was "sufficient in the circumstances of this case to support a finding of segregative intent with a resulting systemwide segregative impact on Yonkers public

schools." *Id.* Thus, according to the district court, "the City's segregative housing practices and the Mayor's appointment of individuals opposed to 'busing' contributed significantly to the confinement of minorities in Southwest Yonkers . . . ." App. 603.

Other than the City's responsibility for public housing site selection and the mayor's appointment of Board members opposed to bussing, the court expressly declined to rely on other "evidence" offered to support the City's liability for school desegregation. For example, the court found that the City did not engage in discriminatory conduct in its decisions relating to the school budget. App. 588. The court also found no discriminatory action in the City's influence on the site selection process for new schools. App. at 603-10. With respect to various City Council resolutions "indicative of the City's interest in and attempts to influence school affairs," the court found an absence of proof that such resolutions were a successful means of exercising "any measurable degree of control over the Board." App. 614.[3]

The district court expressly rejected petitioners' argument that the "independent legal status of the City and Board and the limited nature of the mayoral statutory appointment power" were insufficient to impose liability upon the City for school segregation. App. 667. Although it recognized that the City could not be held liable for the segregated condition of the schools on the basis of "vicarious liability," the court held that it was unnecessary to reach that issue because the "combination of the City's segregative housing practices and mayoral appoint-

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[3] Although the court noted four instances in which individual council members attempted to influence attendance zone changes, such actions (even if attributable to the City) could not support a finding of City liability because, as the district court found, the "Board's consistent refusal to implement [such] attendance zone changes obviated their potential segregative impact on the schools . . . ." App. 613.

ments together have served to perpetuate racial segregation in Yonkers public schools and constitute sufficient grounds for a finding of municipal liability." App. 668.

The district court subsequently entered a detailed remedial order for desegregation of the Yonkers school system, which set forth attendance zones for existing schools, established a voluntary student transfer program and provided for the creation of magnet schools to reduce racial "isolation" by "attracting students to programs that emphasize areas of special interest."[4] App. 686. The district court also entered a supplemental order which made clear that the City was responsible for funding all capital expenditures and operating expenses necessary to implement the school desegregation plan. App. 765. Finally, the court provided that it would review any City reduction of the Board's normal (non-desegregation related) budget request to "determine . . . whether such reduction is justifiable . . . and will not impede or frustrate the Board's ability to implement the Plan," thereby effectively placing the burden on the City to justify reductions in any Board budget request. App. 765-66.[5]

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[4] The district court ordered the City to provide $10,128,000 to fund the increased operating costs for the first year of the magnet-school program. In addition, the City was ordered to provide the Board immediately with desegregation-related capital funds not including the cost of two schools "in an amount not to exceed $15,159,500," bringing the total first year cost of the plan to $25,287,500. See Supplemental Order relating to the funding of the School Remedy Plan, entered July 1, 1986 at App. 765. (hereinafter referred to as "July 1st order"). The district court order of May 13, 1986 also provided for the construction of two new schools at an estimated cost of over $20 million.

[5] The school district's operating budget in 1985-86, without any desegregation plan, was approximately $112,315,000. For the fiscal year 1986-87, the School Board requested $122.9 million for its regular operating expenses *not* including $25,287,500 for desegregation-related expenses and capital improvements mandated by the district court's remedial order. As part of its normal review of the Board's operating budget, the City Council reduced the Board's

3. On the housing issue, the court of appeals affirmed the district court's analysis of the City's intent under the Equal Protection Clause. Although the court recognized that community opposition could not be equated with municipal intent, the court specifically rejected the argument that racial animus among some members of the public could not be attributed to the City unless community opposition was dominantly race-based and the City "gave effect" to that racial motivation. Instead, the court held that, as a matter of law, "the Equal Protection Clause does not permit such [City] actions where racial animus is a significant factor in the community position to which the city is responding." App. 90.

On the school issues, the court of appeals unanimously affirmed both the district court's holding that the City was liable for the segregated conditions in the school system and the district court's remedial orders. First, with respect to the effect of City control over public housing on the Yonkers schools, the court of appeals stated that the district court "was plainly entitled to find that the City's segregative housing decisions were a contributing cause of the increasing segregation in the schools." App. 111.

Second, the court found that the "City was well aware" of the relationship between its conduct with respect to public housing and neighborhood schools. Thus, the "mayor's forthright packing of the Board with persons he believed would adhere to the neighborhood school policy provided clear support for the finding that the

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operating budget amount by approximately $5.1 million. However, the district court's order stated that "[i]f there is any reduction by the City . . . . in the Board's requested appropriation the Court will determine whether the reduction made by the City was justifiable." Prior to that hearing, and as a result of the threat of judicial modification of the City's budget, the City agreed to add $3.5 million (for a total of $121.1 million) to the 1986-87 operating budget.

City deliberately sought to preserve segregation in the schools . . . ." App. 112.

The court of appeals rejected the City's argument that there was an insufficient nexus between the City's actions with respect to housing and the conclusion that the City was liable for segregation in the schools. Instead, the court simply declared, without analysis, that the "segregative effect of [the City's] housing decisions" (and "other" unspecified evidence) was a sufficient basis from which to "infer" the City's "intent to preserve and enhance segregation in the schools." App. 113. The court concluded that "the combination of the City's housing policies, the mayoral appointment of Board members and the subsequent inaction of the Board amounted to an interrelated governmental effort to preserve the integrity of [the racially segregated] 'neighborhood schools' . . . ." App. 114. "[W]here . . . the municipality that has acted to preserve segregated residential patterns and the school board that has acted to preserve segregation in the schools" "cooperat[e] . . . [by] action or inaction, . . . both the municipality and the school board may be held liable for school desegregation." App. 114-15.

With respect to the remedial orders, the court of appeals rejected the argument that the district court had ordered expenditures far in excess of the constitutional minimum without any showing that those expenditures were necessary to correct the incremental segregative effect of the violation. The court also rejected the argument that the district court had exceeded its authority in exercising oversight not only over "desegregation related" expenses but also over the normal operating budget for the school district. Instead, the court simply held that because "the City is responsible for funding the public schools and is responsible in part for the segregated condition of the schools, it was not an abuse of the court's discretion to require the City to fund [a] more expensive . . . remedy." App. 122.

REASONS FOR GRANTING THE PETITION

This case raises three important and interrelated issues, *viz.*, (1) whether a city can be held liable for segregation in public schools caused by intentional acts of an independent school board; (2) whether a municipality must bear the responsibility for funding an increasingly expensive school desegregation remedy without a showing that the expenditures are necessary to desegregate the public schools and (3) whether community opposition to public housing sites, based in significant part on racial concerns, is sufficient to establish municipal "intent" to violate the Fourteenth Amendment if the City is "responsive" to those concerns. On the first issue, the court of appeals has (1) improperly converted a finding of housing discrimination into a basis for holding a city liable for segregated schools, even though the school system was exclusively within the control of the school board, and (2) improperly invaded the discretionary power of appointment vested in the mayor of a city. On the second issue, the court of appeals, in conflict with a holding of the Eighth Circuit, has imposed the burden of proof on a city to show that all expenditures requested by a school board are "unnecessary" to the Board's efforts to desegregate the schools. The third issue, which involves the cornerstone of City liability for both housing and schools, raises an important and unresolved question concerning the required nexus between community attitudes and governmental intent for purposes of holding a city liable for discrimination under the Equal Protection Clause. All three issues will profoundly affect the operation of the educational system of the City of Yonkers for years to come and establish erroneous precedents which will be harmful to other cities throughout the nation. Accordingly, the petition warrants review by this Court.

I. The Petition Raises Important Issues Of Municipal Liability For Public School Segregation That Have Not Been Decided By This Court.

The judgment below, holding the City of Yonkers liable for segregated conditions in the public schools, flies in the face of the finding of the district court that the Board, as an independent body, had *sole* responsibility for the Yonkers public school system. See *supra*, pp. 3-4. Indeed, the district court specifically found that the City did *not* exert any authority or influence over individual Board members or use any "budgetary influence or indirect control" to perpetuate racial segregation in the Yonkers public schools. See *supra*, p. 4 & n.1. Rather, the City's liability for school segregation was based on a novel analysis which relied on two discrete facts: (1) the City's conduct in public housing site selection was found to have a foreseeable impact on conditions in the schools and (2) the City's "intent" was found to be reflected in *the mayor's* discretionary appointment of Board members. App. 667; App. 114. No decision of this Court has ever suggested that these two facts, alone or in tandem, are sufficient to support liability for public school segregation. The holding of the court of appeals converts every finding of housing discrimination into a finding of school segregation if there is a neighborhood school policy, as is the case in most communities. It also deprives the nation's mayors of the discretionary element of what has always been considered a discretionary function: the power to appoint. The judgment below therefore presents a vital question concerning the scope of municipal liability under the Fourteenth Amendment which warrants the attention of this Court.

1. The district court recognized that this Court has never "addressed either the question of whether a city may ever be held liable for segregation in schools or the relevance of a city's housing or other practices to such a determination . . . ." App. 662. Indeed, the court spe-

cifically cited *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971) as "leaving open the question" of "city liability for school segregation" caused by the city's conduct with respect to housing. *Id.* at 663.

The imposition of liability for school segregation based on housing liability not only is without precedent,[6] it is an abdication of "[t]he duty of both the District Court and the Court of Appeals . . . to first determine whether there was any action in the conduct of the business of the [City] which [was] intended to, and did in fact, discriminate against minority pupils, teachers, or staff." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977). Here, the courts relied upon City "action" which was related to the business of site selection for *public housing*—not the condition of public schools. There is simply no evidence and no finding that the City Council made public housing site evaluation decisions for other than housing reasons.

Nor is it sufficient that the housing discrimination would have a foreseeable effect on schools. The Fourteenth Amendment clearly requires more than foreseeability.[7] *Columbus Board of Education* v. *Penick*, 443

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[6] *United States* v. *Board of School Commissioners of Indianapolis*, 573 F.2d 400, 408-410 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978), is not supportive of the holding below. In *Indianapolis* the state government was found to have direct control over, and direct responsibility for, conditions in the public schools. 573 F.2d at 403-407; see also *Arthur* v. *Nyquist*, 415 F. Supp. 904, 953-955 (W.D.N.Y. 1976), *modified*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978) (city liable for actions which intentionally and directly affect operation of the schools). Such decisions are simply inapplicable to the instant case in which the City had no control over the essential patterns of school districting, pupil assignment, site selection, allocation of teachers and other resources or the general school budget process.

[7] Moreover, the notion that the City's numerous decisions concerning public housing placement over the course of four decades had a foreseeable impact on segregating schools is in fact fanciful. It

U.S. 449 (1979). It requires proof that the city acted, "at least in part, 'because of'" the racial impact that placement of public housing would have on schools. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979). The decision of the court of appeals, in effect, subjects any city held liable for segregated housing to liability for segregation in any public setting, such as schools, parks or swimming pools, because housing patterns necessarily have a foreseeable impact on use of all such facilities. Fourteenth Amendment violations, however, are triggered by intentional conduct and not by foreseen effects.

The extension of liability from housing to schools, and beyond, is fundamentally inconsistent with the approach of this Court, which has been careful to impose liability incrementally only upon a showing that the discrete condition in question resulted from "intentionally segregative actions on the part of the [defendant]." *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413 (1977). This approach demands that a court offer a "reasoned statement" (*Dayton*, 433 U.S. at 410) to justify holding state or local officials responsible for discrimination. See *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979). The opinions below, and particularly the opinion of the court of appeals,[8] fall far short of the careful factual and legal analysis mandated by this Court. In-

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depends upon an assumption that each placement decision was made with the expectation that all such decisions over the course of decades would be similarly segregative so that the eventual impact would be to stigmatize an entire area of the City causing housing patterns in general to remain segregated. Assuming *arguendo* that such logic may justify holding the City responsible for segregated housing beyond the specific public units constructed, it cannot be stretched to justify holding the City liable for segregated schools.

[8] The court of appeals addressed the arguments relating to the district court's attribution to the City of liability for school segregation in four paragraphs. See App. 113-15.

stead, the courts below have announced a novel and expansive theory, under which liability under the Fourteenth Amendment may be multiplied many times over.

With little or no guidance as to the boundaries of the theory of liability, the decisions lead to virtually limitless liability for any city which is found to contribute to segregated housing patterns. In fact, segregation in housing is a substantial—if not a "principal"—cause of school segregation in this country. See *Austin Independent School District* v. *United States*, 429 U.S. 990, 994 (1976). When, as here, the nexus between housing and schools is treated in terms of simple causation, no matter how minor the effect, a city's contribution to segregated housing patterns can *always* be found to be a "but for" factor in increasing the segregated conditions in neighborhood schools. Such a drastic change in the liability of our nation's cities for such an important aspect of their duties surely deserves this Court's attention.

2. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for the public schools and to quality of the educational process." *Milliken* at 741-42. In this case, the appointment of school board members by the mayor is the only means by which local control over the operation of the Yonkers public schools may be exercised. The second element of the decisions below—the holding that the Mayor's exercise of his appointment power supports the finding of City liability—strikingly undermines the processes of local control in the City of Yonkers.

Despite the clear findings of the court below that the City lacked control over the public schools,[9] both the court

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[9] This conclusion was clearly correct and well supported under New York law. See *supra*, pp. 3-4, 6-7. " 'If there be one public policy well-established in this State it is that public education shall be

of appeals and the district court found the City liable for the segregative actions of the school board in part on the ground that "the conduct of Board members was generally consistent with the Mayor's intentions and objectives in appointing them to the Board." App. 602. By imputing liability based on the forseeable outcome of the mayor's exercise of his appointment power, the judgment below effectively imposes vicarious liability upon the City and substantially conflicts with well-established rules relating to the proper scope and limits of constitutional liability. It also threatens to undermine the general principle, well-established in the opinions of this Court, that discretionary appointments of public officials should be free from judicial scrutiny. See *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974).

a. The decision below condemning the mayor's appointments is inconsistent with decisions refusing to impose liability upon state or local governments in the absence of evidence that the state actors in question have violated the Constitution by their *own conduct*. *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Indeed, this Court has made clear that constitutional liability may not, in any circumstance, be imposed on a municipal government under a theory of vicarious liability. *Monell* v. *New York Dep't of Social Services*, 436 U.S. 658 (1978); see *Rizzo* v. *Goode*, 423 U.S. 362, 370-71 (1976); *Washington* v. *Davis*, 426 U.S. 229 (1976). Under *Monell*, a municipality cannot be held liable for the conduct of persons

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beyond control by municipalities and politics.'" *Kelly* v. *Board of Education of New York City*, 141 N.Y.S. 2d 34, 36 (N.Y. Sup. Ct. 1955). The Board derives its power from state law and is subject to control by the New York State Board of Regents and the Commissioner of Education, not the City of Yonkers. N.Y. Const., art. V, sec. 4; art. XI, sec. 2; N.Y. Educ. Law, secs. 207, 305 (McKinney 1981). See *New York City School Boards Ass'n, Inc.* v. *Board of Education of New York City*, 39 N.Y.2d 111 (1976); *Ocean Hill-Brownsville Governing Board* v. *Board of Education of New York City*, 23 N.Y.2d 483 (1969).

over whom it exercises no control, even though the power to control is present. *Monell*, 436 U.S. at 694 n.58 ("mere right to control without any control or direction to supervise is not enough to support [constitutional] liability"). Here, not only is evidence of actual control lacking, the City lacked any power to control the conduct of the Board. See *supra*, pp. 3-4, 6-7.

The analysis adopted by the courts below attributes responsibility for Board conduct to the City because the Board members appointed by the Mayor acted in a way that was "forseeable," and thus the intent to undertake such acts may be attributed to the City. But, such an argument is irreconcilable with established law. First, given the required presumption that public officials will exercise their powers in a lawful manner (*United States* v. *Pate*, 324 F.Supp. 935, 939, *aff'd.*, 400 U.S. 806 (1970)), there is no basis for a rule of law that imposes liability on a City based on the "forseeability" of unconstitutional conduct by City appointees. That rule is particularly unwarranted where the conduct largely relied upon to demonstrate the City's intent—an opposition to bussing—was neither unlawful in iteslf nor likely to be acted upon in an unlawful manner.

Second, even if it were proper to look to the forseeable results of the mayor's appointments as evidence of the City's intent, this Court has made clear that forseeability is insufficient to establish the requisite intent of a constitutional violation. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464 (1979) (forseeability of discriminatory consequences does not establish necessary showing of improper intent); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 ("Discriminatory purpose" "implies more than intent as volition or intent as awareness of consequences"). If the forseeability of the consequences of one's *own acts* is insufficient to establish discriminatory intent, then it follows, *a fortiori*, that the decision below, which attrib-

utes discriminatory intent to the City based on the foreseeable conduct of third parties, clearly is impermissible.

b. The decision below also conflicts with the decisions of this Court because the court of appeals improperly blurred the responsibility of distinct state actors. "[J]udicial powers may be exercised only on the basis of a constitutional violation," *Swann*, 402 U.S at 16; *Rizzo*, 423 U.S. at 370-371, and therefore federal courts may remedy discriminatory conduct in the administration of a state law or program only against those officials empowered to administer that law or program. This Court has therefore required a showing of direct responsibility for unconstitutional actions before relief is ordered—a showing that clearly is not present in this case.

Obviously, direct responsibility for school operations—and the segregated conditions that the court found to be unlawful—rested with the Board and not the City. Moreover, the decision below does not rely on any argument that the mayoral appointments were themselves unlawful acts, for which the City could be held liable. App. 670-72. Instead, the appointments were relied upon to provide circumstantial evidence of the City's intent (related to schools) which, when coupled with its conduct (related to housing), was held to be sufficient to support the City's liability for school segregation. The district court justified this intentional blurring of the lines of responsibility on the ground that a "hypothetical single state agency which . . . engage[d] in the racial segregation of both housing and schools" would be held liable for both. App. 648. Therefore, according to the court, it was "inconceivable" that responsibility could be "fractionalized" in a way that "avoid[ed] legal accountability" for the "identical result." *Id.* But this reasoning is directly contrary to the Court's requirement that constitutional liability rest only on that entity with responsibility for the allegedly unconstitutional conduct or conditions. See *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

c. This Court has consistently emphasized the need for judicial restraint in the delicate area of oversight by federal courts of discretionary appointments under state law. In *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974), the Court warned against inappropriate "judicial oversight of discretionary appointments [which] may interfere with the ability of an elected official to respond to the mandate of his constituency." While the courts below did not directly challenge the constitutionality of the appointment process or order the Mayor to "exercise his discretion in a specific way" (*Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 321 (1970)), they did examine in painstaking detail the manner in which the Mayor actually exercised his discretionary appointment authority.

This examination of the mayor's exercise of authority —and the imposition of liability based on those appointments—directly intrudes into the state processes in the manner feared by the Court in *Mayor*. Moreover, such an inquiry was not only inappropriate, it was entirely unnecessary. The courts had before them the responsible party—the Board—and the power to undertake any remedy necessary to correct racially segregated conditions in the Yonkers public schools. In such circumstances, it was totally inappropriate to engage in any review of the mayoral appointment process or to find the City liable, even in part, based on the Mayor's exercise of his discretionary authority.

II. The Petition Raises Important Issues Regarding The Limits Of Remedial Orders For The Funding Of School Desegregation Orders.

The decisions below violate the well-established principle that desegregation remedies may not go beyond correcting the constitutional violation involved, and may not intrude unnecessarily on the interests of state and local authorities in managing their own affairs. This Court

has made clear that not only must a desegregation plan be appropriate to a constitutional violation, but also it may reach no further than the incremental harm caused by the infraction itself. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Moreover, in formulating such remedies courts must give due consideration to any "burdensome effects" the plan might impose on local government officials. *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 n.15 (1977); see also *Little Rock School District* v. *Pulaski County Special School District*, 778 F.2d 404, 434 (8th Cir. 1985); *Valley* v. *Rapides Parish School Board*, 702 F.2d 1221 (5th Cir. 1983).

In this case, the City and Board could have satisfied their constitutional obligation to desegregate the Yonkers Public School System through a compulsory bussing program. Instead, they selected a remedy which concentrates not on mandatory student assignments with extensive bussing, but rather on increasing the quality of educational programs, thereby inducing voluntary changes in student attendance patterns.

A transportation remedy would have cost the City approximately $4.7 million for the 1986-87 school year, 90% of which would have been reimbursed by the State of New York in the subsequent fiscal year. In contrast, it is undisputed that the Board's decision to implement the magnet-school remedy instead of a bussing program cost the City five to six times this amount. Moreover, the cost of this remedy increases on a regular basis as the Board eagerly incurs additional expenses—including the construction of new schools—which it passes on to the City. No one contends that the wrong choice was made at the outset, *i.e.*, that it would have been better to spend more money on busses and less on upgrading the City's educational offering. But the issue of how much additional cost the City will be required to bear is a substantial question that will recur every year the school desegregation remedial decree is in effect.

This Court should grant the petition to determine under what circumstances a federal court may order expenditures above the constitutionally required minimum in cases involving non-bussing desegregation remedies.

1. It has long been recognized that "[t]he power of the federal courts to restructure the operation of local and state governmental entities is not plenary. It 'may be exercised "only on the basis of a constitutional violation."'" *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419-20 (1977) (*quoting Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974) and *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971)). It follows that "[o]nce a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Dayton*, 433 U.S. at 420 (quoting in part from *Swann*, 402 U.S. at 16, and *Milliken*, 418 U.S. at 744).

This Court's holdings in *Swann*, *Milliken*, and *Dayton* suggest that when a City has spent in excess of the constitutionally-required minimum, the judgment of the City in refusing to appropriate even larger, educationally-enriching expenditures must be respected absent a showing by proponents of additional expenditures that the monies are necessary to correct the violation's "incremental segregative effect." In other words, proponents of additional expenditures must demonstrate that absent such expenditures, the more costly magnet-school remedy would be materially less effective in achieving desegregation.

The basis for this rule is quite simple. By making expenditures beyond the constitutionally-required minimum, local authorities have demonstrated a good-faith willingness to comply with their constitutional obligation. Under those circumstances, the burden of proving that even higher expenditures are required to bring the program up to constitutionally-mandated remedial levels should rest with those who contend that the remedial

efforts are inadequate. Any other rule would take the courts beyond their role of enforcing the Constitution and into the role of allocating scarce City resources. It would convert the finding of school board segregation into an economic windfall for the school board, at the expense of other competitors for scarce City resources such as police and fire services, parks, street improvements, social services programs and many others. Every year, in every city throughout this country the various city boards, agencies and departments compete at budget time for the city's finite resources. Each knows that in any given year it may not receive as much money as it would like. But, in the City of Yonkers, one of the erstwhile competitors for city funds has been relieved of the need to compete. And this has happened solely because Yonkers has voluntarily agreed to a desegregation plan many times more expensive than one which would have fully satisfied its constitutional obligation. Plainly, under those circumstances, the school board should bear the burden of showing that additional school expenditures are reasonable and necessary.

2. In rejecting this general principle, the Second Circuit has placed itself in conflict with the Eighth Circuit's decision in *Liddell* v. *State of Missouri*, 731 F.2d 1294 (8th Cir. 1984), in which that court of appeals struck down a district court order requiring the state to fund specific educational programs as part of a school district's desegregation plan. After a finding by the district court of *de jure* segregation, the defendant school board and the plaintiffs entered into a settlement agreement, rejecting the traditional bussing remedies and opting instead for a comprehensive magnet-school/incentive remedy. The state, which controlled all educational funding, objected to the plan's scope and breadth, claiming that it was nothing more than an attempt by the school board to obtain funding for projects which were totally unnecessary to the desegregation of the school district. Nevertheless, the district court approved the settlement, and the

state appealed, claiming that absent a showing by the school board that each specific program contained in the incentive remedy was necessary to rectify the constitutional violation, the district court had overstepped its authority by intruding into an area expressly reserved to local government.

The Eighth Circuit agreed. Recognizing that, if unchecked, a school board could improperly "use a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation," *Liddell*, 731 F.2d at 1316, the court of appeals held that no part of the plan could stand unless the school board presented evidence that that part was "essential as [a] remedial or compensatory program[]." *Id.* at 1318. Thus, while finding adequate record support for a few of the programs in the district court-approved settlement, the court of appeals vacated numerous funding orders because the school board had not "made its case" as to the necessity of the specific program in formulating a constitutionally acceptable remedial plan. *Id.*

The decision in *Liddell* is correct and conflicts squarely with the approach of the courts below. The Eighth Circuit specifically requires that before a district court can order a public entity to fund any aspect of a more expensive desegregation remedy, the school board must satisfy its burden to prove that the program is necessary to the desegregation plan. The Second Circuit, on the other hand, held that once a violation was found, the district court had full authority to take any action it deemed reasonable and necessary and that the City bore the burden of showing that "any part of the adopted plan was duplicative or unnecessary to the plan's success." App. 122. This Court should grant the petition in order to resolve this dispute between the circuits on the recurring issue of which party has the burden of justifying additional expenditures under very expensive, non-bussing remedies.

III. The Courts Below Erred In Holding The City Liable For Housing Discrimination On An Intent Theory That Presents An Important Question Of Federal Law.

The underlying holding of the courts below that the City is liable for segregated housing was based upon findings concerning the City's intent that raise an independent issue that warrants review by this Court. The City's liability in this case (for housing initially and ultimately for schools) hinges on the holding that the City is liable for intentional discrimination based on the expressed opposition of members of the community, and not public officials, to placement of low income housing on the East side of Yonkers. That holding, which converts a legitimate political choice into a violation of the Constitution, warrants scrutiny by this Court.[10]

1. During the five decades encompassed by this litigation, the City of Yonkers faced a complex series of problems arising out of urban housing conditions that were typical of cities in the northeastern United States. One of the City's responses to urban decay was to participate in federal urban renewal and subsidized housing programs, which resulted in the creation of 6800 units of safe, clean and affordable housing for residents of the City of Yonkers, App. 138. It is the concentration of those units of low income housing in southwest Yonkers that underlies the housing liability claim in this case. The City does not dispute that low income housing tended to be placed in those areas that were most in need of rehabilitation, but the City does dispute that its motive in doing so subjects it to constitutional liability. The City's liability ultimately must turn on a finding that the City—through its elected officials—acted with racially

[10] On January 28, 1988, the City, the United States and the NAACP entered into a remedial consent decree which requires the construction of 200 units of public housing on specified sites. Unless that decree is modified or vacated, the City will be obligated, pursuant to the terms of that decree, to go forward with the construction of housing as specified by the decree.

discriminatory intent in its decisions regarding the placement of low income housing, and no such explicit finding was ever made by the district court.

In the area of social relations, there is no issue which generates more emotion than the question of where to locate low income housing projects. The reasons are obvious. Residents in predominantly single family residential areas believe that construction of a governmentally subsidized low income housing project will significantly alter their neighborhoods and have a substantial, adverse impact on the value of their homes. In many cases, this belief is well founded. See, *e.g.*, C. Gruen & N. Gruen, Low and Moderate Income Housing in the Suburbs 94 (1972). Unfortunately, there also may be an underlying element of fear and distrust for potential residents of a low income housing project that is based on race. Nevertheless, not everyone who opposes construction of a low income housing project nearby does so in whole or in part with racial animus. Even a proposal for a low income project that would house no minority residents would likely meet with substantial opposition. This is because there are wholly legitimate, non-racial reasons for opposing the infusion of high density, low income housing into single family residential areas. See *City of Memphis* v. *Greene*, 451 U.S. 100, 126-127 (1981). Even among minority residents, both in Yonkers and elsewhere, there is no uniformity of opinion regarding the proper placement of low income housing. See App., infra, 225-29; see also *City of Mobile, Alabama* v. *Bolden*, 446 U.S. 55, 91 (1980) ("[T]he same 'group interest' may simultaneously support and oppose a particular" housing strategy).

This pattern of varying attitudes which exists in most communities is precisely what the district court found in Yonkers. There was strong neighborhood opposition to site proposals in northwest and east Yonkers, which are largely single family residential areas. There was less

opposition to proposed sites in the southwest where the new apartment buildings would replace old, substandard ones. The motivations of the residents throughout the City were complex, but they were dominantly economic. Race played a part, but only a part and certainly not a dominant one, in the reactions of some members of the community.

While the district court's opinion contains numerous abstract statements about the racial motivation of "the City," the district court's summary of its findings generally described the City's *officials* as "entirely well-meaning public servants acting in accordance with their perception of what was feasible in the political and socio-economic circumstances of Yonkers and in the best interests of that community." App. 135. The elected officials of Yonkers did not act on the basis of any personal or official desire to disadvantage minorities. Rather, "the [district] court found that whenever a site was proposed for a predominantly white area, strong community opposition emerged." App. 24. "Though this opposition was not 'based *wholly* upon race,' race was 'a significant factor.'" *Id.* (emphasis in original). However, the district court also found that "City officials consistently responded to [public] opposition" (*id.*) and that, therefore, such "significant" racial motivation could be attributed to the City. The court of appeals affirmed this holding, reasoning that "the Equal Protection Clause does not permit such [City] actions where racial animus is a significant factor in the community position to which the city is responding." App. 90.[11]

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[11] The court of appeals attempted to downplay the significance of this holding by noting that the district court "did not find that City leaders had no racial concerns of their own." App. 89. The court, however, cites to the district court's findings that "certain officials" had made "conscious decisions" to concentrate on "politically feasible" sites and that "numerous City officials not only responded to but 'led the fight against subsidized housing in East Yonkers.'"

2. The decision of the court below therefore presents an important and unresolved question of federal law regarding the extent to which the City's response to public opposition to certain public housing sites—which was, in some "significant" part, racially motivated—may support the finding that the City itself intentionally discriminated on grounds of race. In several important respects, the imputation of discriminatory motive to the City in this case is at odds with the analysis in prior decisions of this Court.

First, this Court has recognized that many official decisions must be analyzed in the face of strongly divergent attitudes about what outcome will best serve the public interest. In the context of voting rights, for example, the loss of an important political battle by a minority group (even in the face of some invidious intent) will not give rise to a constitutional violation as long as the process is fundamentally fair. See *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

> [A] political decision that affects group . . . rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment . . . . The standard for testing the acceptability of such a decision must take into account the fact that the responsibility for the [municipal deci-

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App. 89. Thus, the court of appeals concluded that "the Council was not just a reactive body." *Id.*

This response is inadequate. First for obvious reasons, a finding that some City officials intentionally opposed subsidized housing in single family neighborhoods is not the equivalent of a finding that they acted with racially discriminatory intent. Second, regardless of the motivation of some City officials, the district court's finding of intentional discrimination unquestionably relies on the propriety of imputing a "significant" private motivation to the acts of public officials. If there were sufficient evidence of "official" racial animus, the district court would not have gone to the extraordinary lengths it did to document private opposition and explain the nexus of that opposition to the actions of City officials.

> sion] is generally committed to the legislative process and that the process inevitably involves a series of compromises among different group interests. If the process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular segments of the [population].

Id. at 91 (Stevens, J., concurring). The decision below does not "take into account" the political compromise inherent in City Council decisionmaking, but instead, holds that politically responsive legislative action is unconstitutional if the intent of the persons responded to is discriminatory in some "significant" respect.

Second, and contrary to the statement of the court of appeals, the decision finds no support in the opinions of this Court which have held that racially motivated state action may not be permitted to "give effect" to private biases that are solely or dominantly based on race (*Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984)) and that official discrimination may not be excused by deference to private prejudice. See *City of Cleburne* v. *Cleburne Living Center, Inc.*, 105 S.Ct. 3249 (1985). In fact, the reasoning endorsed below represents a substantial extension of those opinions. It is one thing to say—as this Court did in those cases—that private prejudice does not justify intentionally discriminatory state action and it is quite another to suggest that the existence of some, even significant, private prejudice may be imputed to legislative action, when the district court makes no finding that any municipal official has intentionally discriminated and there are significant non-racial justifications for the City official's decisions.

Finally, the theory of the courts below simply fails to meet the intent requirement set out by this Court in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979). Under that decision, discriminatory intent may be found where:

> the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.

The theory adopted below does not require a finding that community opposition be "because of" race or dominantly race-based. Nor does it require that City action be undertaken "because of" community opposition. Both "links" in the theory's chain of causation and intent fail to meet the standard set by this Court.

The appropriate analysis for determining whether a claim of race-based community opposition may translate into "official" discriminatory animus was undertaken in *Angell* v. *Town of Manchester*, 3 Equal Opportunity Housing Cases (P-H) ¶ 15,398 (D. Conn. 1981). There, voters approved by referendum a two year moratorium on Community Development Block Grant (CDBG) programs. The town subsequently did not participate in the program and the district court found that the town officials chose not to do so in response to the wishes of the voters. Despite the evidence that "some of the more vocal opponents of the CDBG expressed their opposition in racial terms and that much of the opposition was directed to the program's promotion of subsidized housing," the court refused to impute an invalid racial motivation to the officials that responded to the community opposition.

> Although some evidence in the record supported the contention that racial motivation played a role in the passage of the referendum, it was far short of being sufficient to invalidate this governmental action. It is obvious that "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." *Palmer* v. *Thompson*, 403 U.S. at 224-25.

Id. at 15,998.285. See *City of Mobile* v. *Bolden*, 446 U.S. at 97 (White, J., dissenting). In the instant case,

by contrast, the courts below simply relied upon the existence of "significant" race-based opposition within the community to hold City officials liable for their "responsive" decisionmaking. The extraordinary step of imposing upon a municipality liability under the Constitution when the community's leaders made good faith decisions to respond to strongly divergent political demands should only be based on a finding that private opposition to subsidized housing was *dominantly* raced-based and that the City gave effect to that opposition.

The holding below concerning the proper legal standard for converting private racial attitudes into municipal conduct has substantial implications for future cases. "Significant" community opposition based on race is a completely amorphous standard and one that does not adequately protect local legislative prerogatives. No municipal leader faced with a public housing site decision will know with any confidence whether a decision to vote against placement in one district because of community opposition can be converted subsequently by a federal court into a potential Fourteenth Amendment violation. As the nation faces a low income housing crisis in the next decade and placement of housing becomes a high priority on the national agenda, it is crucial that this Court clearly enunciate now the appropriate legal standard for resolving the intent issue. The importance of that issue is, of course, magnified in this case because the finding of intent with respect to housing has led inexorably to a concomitant finding that the schools were also segregated. Thus, if this Court holds that the City did not intend to segregate with respect to housing, then the holdings on the school issue also would have to be set aside. Accordingly, review by this Court of the underlying housing issue is vital to a proper resolution of all of the issues decided by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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